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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 292

MILFORD FULLER, ... *Petitioner*

v.

STATE OF ARKANSAS, ... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

EUGENE W. MOORE
ROBERT G. BROCKMAN

A. A. C. Building
Harrison, Arkansas 72601

DALE PRICE
FLETCHER JACKSON

211 Spring
Little Rock, Arkansas 72201

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

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To the Chief Justice and the Associate Justices of the Supreme Court of The United States:

Your petitioner, Milford Fuller, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Arkansas entered on May 19, 1969 affirming his conviction of the crime of possession of stolen property despite the conviction being based upon real evidence obtained as the result of a constitutionally illegal search and seizure and statements by the petitioner and his co-defendant obtained as a result of the same illegal search and seizure and said conviction resulting in a longer sentence upon retrial after a reversal for constitutional errors committed in a first trial.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at: *Fuller and Walton* v. *State*, 246 Ark. 681, 439 S.W. 2d 801 (1969). A copy of the opinion is printed in Appendix "A" to this petition. The opinion of the Supreme Court of Arkansas reversing petitioner's first conviction is reported at: *Walton and Fuller* v. *State*, 245 Ark. 91, 431 S.W. 2d 462 (1968). A copy of this opinion is printed in Appendix "B" to this petition.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on April 21, 1969. That Court entered final judgment upon denying rehearing May 19, 1969, a copy of which is printed in Appendix 'C". The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257 (3).

To comply with Rule 23 (1) (F) of this Court, we submit the following account of how the federal questions herein presented were raised.

The questions on search and seizure, and on statements given officers were raised in the previous trial of this case, and upon appeal, where the Supreme Court of Arkansas in *Walton and Fuller* v. *State*, 245 Ark. 91, 431 S.W. 2d 462 (1968) reversed petitioner's first conviction.

Upon retrial, Walton and petitioner Fuller raised these questions upon motion to suppress evidence (R. 17-119). The trial judge denied the motion, to which ruling petitioner duly excepted (R.118-121). Throughout the trial, petitioner objected and excepted to matters along

these lines (R. 124, 129, 135, 136, 138, 143, 146, 147, 149, 152, 153, 154, 157, 167, 170, 172, 173).

The question of the longer sentence upon the retrial was raised after verdict, and all questions now presented were included in the motion for new trial (R.7). The trial court denied a new trial, to which ruling petitioner excepted (R.14, 15).

The questions here presented were raised in the appeal to the Supreme Court of Arkansas, and were discussed in that Court's opinion affirming petitioner's conviction (R.252). These questions were included in the petition for rehearing (R.260), which rehearing was denied (R.270).

QUESTIONS PRESENTED

1. Whether error was committed in holding that a television set and record player were admissible into evidence regardless of the fact that their disclosure was during a search being conducted under the authority of an invalid search warrant.

2. Whether error was committed in holding that statements given officers were admissible into evidence, even though the product of a search and seizure under an invalid search warrant.

3. Whether error was committed in sentencing petitioner to a longer term, ten years, upon a retrial of his case after a reversal of a sentence of four years for errors under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4 to U. S. Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 to U. S. Constitution:

* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty, or property, without due process of law * * *.

Amendment 14 (1) to U. S. Constitution:

* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

Sheriff Mickey Owens of Greene County, Missouri, with other police officers, came to Harrison, Arkansas, and contacted the Sheriff of Boone County, Arkansas, about a large quantity of men's clothing and television sets alleged to have been stolen from various stores in Missouri (R.27, 28). From the Municipal Judge, they procured a warrant to search the premises of the Golden Rich Distributing Co., Inc. on Highway 62 North, in Harrison, Arkansas, for 22 television sets (R.197). A list of these television sets was attached to the search warrant and included some Zenith color televisions, and other models (R.201, 202).

The Supreme Court of Arkansas, in reversing petitioner's first conviction, held that the search warrant was invalid for lack of proof of probable cause to justify its issuance. *Walton and Fuller* v. *State*, 245 Ark. 91, 431 S.W. 2d 462 (1968).

On September 7, 1967, armed with the invalid search warrant, Sheriff Doyle Hickman of Boone County, Arkansas, his deputy, Glen Logan, Sheriff Mickey Owens of Greene County, Missouri, other Missouri police officers, Arkansas State policeman Earl Rife, and another Arkansas state policeman, descended on the Golden Rich Distributing Company (R.40).

There, Sheriff Hickman read the substance of the search warrant to the owner of the premises, Leo Walton, and gave it to him for inspection (R.66). Walton told him that the television sets were there and that Milford Fuller had some connection with them. Walton phoned Fuller to come there, and he did (R.40, 41).

Walton showed the various officers through the building, pointing out the television sets and other property (R.43, 46). He told them that there was also a television set and a stereo record player upstairs in his apartment that had been with the television sets downstairs (R. 43, 44). He and some of the officers went upstairs to the apartment to check out the Zenith color television set and the Zenith stereo record player located there (R.43). The serial number did not match the ones on the officers' list (R.43). Milford Fuller was not present during this time (R.108, 109).

The officers had the television sets downstairs moved out, but left the Zenith color television set and the Zenith stereo record player upstairs with the agreement that they could return later and check them out (R.48).

Confronted with the stolen property, Leo Walton and Milford Fuller were allegedly advised of their rights, and asked by the officers to tell what they knew about the property (R.226).

Leo Walton and Milford Fuller gave statements on September 7, 1967 and September 8, 1967, respectively (R.214, 226).

On September 12, 1967, state policeman Rife, the Sheriff of Webster County, Missouri, and a Mr. Carter, returned to Walton's and checked the Zenith Color television set and the Zenith stereo record player against Mr. Carter's list of items allegedly stolen from him. The serial numbers matched (R.44, 45).

The State of Arkansas tried Leo Walton and Milford Fuller for the crime of possession of stolen property, i.e. the Zenith color television set, serial No. Y 236, and the Zenith stereo record player, serial No. Y 228 (R.148).

Introduced at the first trial were testimony about the whole range of stolen property found at the Golden Rich Distributing Co., Inc., and the September 7th and September 8th statements of Walton and Fuller.

Upon conviction, Walton and Fuller appealed their four year sentences to the Arkansas Supreme Court. As noted above, that Court held the search warrant invalid, held some of the testimony and statements inadmissible as the product of the invalid search warrant, and reversed the convictions, remanding for a new trial.

Facing a new trial, Walton and Fuller again filed motions to suppress as evidence the Zenith color television and the Zenith stereo record player, the testimony about them, and the statements given the officers (R.17-119). The trial judge overruled these motions (R.117-121).

Upon retrial, Walton and Fuller were again convicted but this time they received sentences of ten years, whereas before they had received only four years (R. 178-180).

They again appealed. The Arkansas Supreme Court affirmed their conviction. *Fuller and Walton* v. *State*, 246 Ark. 681, 439 S.W. 2d 801 (1969). That court stated that the Zenith color television set, the Zenith stereo record player, testimony about them, and statements concerning them were admissible, "regardless of the fact that the voluntary disclosure was made at a time when the search was being conducted under the authority of the defective warrant". The court held that a successful appeal and a resultant new trial includes the possibility of a longer sentence upon retrial, and left standing petitioner Fuller's 10 year sentence (R.252-259).

REASONS FOR GRANTING THE WRIT

Petitioner Milford Fuller submits that there are special and important reasons for the granting of the writ prayed for, namely, that the decision of the Supreme Court of Arkansas in the instant case below is not in accord with the applicable decisions of this Court, and that on one question raised, increased sentence, there are before the Court at the present time similar cases not yet decided which would control the decision of the instant case.

1. The decision of the Arkansas Supreme Court on the admissibility in evidence of the Zenith color television and the Zenith stereo record player, "regardless of the fact that the voluntary disclosure was made at a time when a search was being conducted under the authority of the defective warrant", is not in accord with the decision in *Bumper* v. *State of North Carolina,* 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed 2d 797 (1968), which case was cited to the Arkansas Court, but not referred to in that Court's opinion.

In *Bumper,* a County Sheriff, two deputies and a State investigator went to the house of Wayne Bumper's grandmother, Mrs. Hattie Leath, where he lived, and told her that they had a search warrant. She opened the door and let them in and they searched the house, finding a .22-caliber rifle allegedly used in the commission of a crime. The rifle was introduced at Bumper's trial, after a motion to suppress was denied. At the hearing on the motion, the prosecuting attorney informed the Court that he was not relying on a search warrant to justify the search, but was relying upon the consent by the grandmother, Mrs. Leath, to the search.

The opinion of the Court, reversing Bumper's conviction because of the constitutional error committed in admitting into the evidence the rifle, stated:

> "The issue thus presented is whether a search can be justified as lawful on the basis of consent when the 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.
>
> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion there cannot be consent.
>
> We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner."

2. The decision of the Arkansas Supreme Court that petitioner Fuller's and Leo Walton's statements were admissible in evidence, is patently not in accord with the decision of this Court, in *Fahy* v. *State of Connecticut*,

375 U.S. 85, 84 S.Ct. 229, 11 L.Ed 2d 171 (1963), which case was cited to the Arkansas Court, but was not referred to in that Court's opinion. In the *Fahy* case, the Court, reversing Fahy's conviction, stated:

> "Other incriminating evidence admitted at trial concerned admissions petitioner made when he was arrested and a full confession made at the police station later.
>
> * * *
>
> "The record does not show whether Fahy knew that the police had seized the paint and brush before he made his admissions at the time of arrest and enroute to the police station. In oral argument, however, counsel for the State told the Court that Fahy 'probably' had been told of the search and seizure by then. Of course, the full confession was more damaging to the defendants, and unquestionably the defendants knew the police had obtained the paint and brush by the time they confessed. But the defendants were not allowed to pursue the illegal search and seizure inquiry at trial, because, at the time of trial, the exclusionary rule was not applied in Connecticut state courts. Thus petitioner was unable to claim at trial that the illegally seized evidence induced his admissions and confession. Petitioner has told the Court that he would so claim were he allowed to challenge the search and seizure as illegal at a new trial. . . And we think that such a line of inquiry is permissible. As the Court has noted in the past: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' . . . Thus petitioner should have had a chance to show that his admissions were induced by being confronted with the illegally seized evidence."

3. On the question of whether error was committed in sentencing petitioner to a longer term, ten years, upon a retrial after a reversal of a sentence of four years for errors committed under the United States Constitution, the Court now has before it for argument cases on this question.

These cases are *Simpson* v. *Rice,* 396 F. 2d 499 (5th Cir. 1968), cert. granted, 89 S. Ct. 292 (U.S. Nov. 12, 1968, No. 418) and *North Carolina* v. *Pearce,* 397 F. 2d 253 (4th Cir. 1968), cert. granted, 89 S. Ct. 258 (U.S. Oct. 29, 1968, No. 413). The latter case from North Carolina was based on that Circuit's ruling in *Patton* v. *North Carolina,* 381 F. 2d 636 (4th Cir. 1967), cert. denied, *North Carolina* v. *Patton,* 390 U.S. 905, 88 S.Ct. 818, 19 L.Ed. 871 (1968). In the *Patton* case, the Circuit Court said (p. 639, 641) the following:

> "The risk of a denial of credit or the risk of a greater sentence or both on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress. For this reason, the District Court declared that predicating Patton's constitutional right to petition for a fair trial on the fact that he has consented to a possibly higher punishment offends the due process clause of the Fourteenth Amendment.
>
> * * *
>
> "In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the real possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial — that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the appearance of improper motivation is a disservice to the Administration of justice."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE W. MOORE
ROBERT G. BROCKMAN

A. A. C. Building
Harrison, Arkansas 72601

DALE PRICE
FLETCHER JACKSON

211 Spring
Little Rock, Arkansas 72201

Counsel for Petitioner

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 5410

Opinion Delivered April 21, 1969

MILFORD FULLER AND LEO WALTON, *Appellants*

v.

STATE OF ARKANSAS, *Appellee*

Appeal from Boone Circuit Court
JOE D. VILLINES, Judge
AFFIRMED
J. FRED JONES, Associate Justice

This appeal arises from the re-trial of *Walton and Fuller* v. *State*, 245 Ark. 84, 431 S.W. 2d 462, which was reversed by this court on September 9, 1968, and remanded to the Boone County Circuit Court for a new trial.

The facts set out in that case are the same as those in the case at bar and are reiterated briefly as follows: Law enforcement officers from Missouri, accompanied by local officers, made searches of certain premises in and near Harrison in Boone County, Arkansas, and seized numerous items of personal property which had been stolen in Missouri. The principal items involved consisted of men's suits and television sets, and the items were seized under search warrants obtained in Boone County. The warrants described the premises to be searched and specifically described the property searched

for. During the search of the premises, the appellant Walton directed the officers to his living quarters and pointed out to them a color television and a record player which were not designated objects of the search, but which were later determined to be stolen property and seized under voluntary relinquishment by Walton.

In the first trial all of the stolen property seized was admitted in evidence. The appellants were found guilty by the jury and sentenced by the court to four years in the penitentiary. On appeal, this court held that the warrants were defective under which the searches were conducted and that the trial court erred in admitting into evidence the objects seized thereunder. The case was reversed and remanded for a new trial. At the second trial, from whence comes this appeal, the appellants were again found guilty and sentenced on the jury verdict to ten years in the penitentiary. On this appeal from their second conviction, the appellants rely on the following points:

> "1. The court erred in denying defendants' motion to suppress all evidence, statements, and other matters obtained as the result of illegal searches and seizures and their motions to suppress evidence under the doctrine of the 'fruit of the poisonous tree.'
>
> 2. The court erred in denying defendants' motion to suppress defendants' statements and in permitting testimony and evidence concerning the statements to be introduced into evidence.
>
> 3. The court erred in accepting the verdict of the jury and sentencing the defendant to a longer term in the Arkansas Department of Corrections than is permissible under law.

4. The court erred in admitting into evidence the Zenith television set and Zenith record player, the possession of which the defendants were charged and in failing to direct a verdict of acquittal of the appellant at the close of the evidence in the case."

Appellants' first and fourth points have already been decided adversely to their contention in *Walton and Fuller* v. *State, supra,* and our decision there becomes the law of this case as to the admissibility of evidence as to the television set and the record player which defendant "voluntarily" pointed out to the officers at the time of the second search. In that case we held this evidence to be admissible regardless of the fact that the voluntary disclosure was made at a time when the search was being conducted under the authority of the defective warrant. On this point we said:

> " . . . Walton, in the presence of Fuller, voluntarily advised Sheriff Hickman of Boone County and Sgt. Rife that there was a quantity of other property besides the television sets for which the search was being conducted, and that he wanted to show them where it was. He told them that he had certain suits of clothing and the television set and record player upstairs in his living quarters. . . *Under these circumstances, the property found in the Walton living quarters and his statements about them were not come about through exploitation of an illegal search. . .*
>
> *For the reasons above set out, the television set and record player were admissible in evidence."* (Emphasis supplied.)

Appellants' second point is likewise without merit for the same reason. In *Walton and Fuller* v. *State, supra,* this issue was resolved in the discussion of the

evidence which was to be excluded as a result of the invalid search, wherein we said:

> " . . . [I]dentification of property which was inadmissible should have been excluded by the trial court as 'fruit of the poisonous tree,' . . . Furthermore, statements by both Walton and Fuller made in the prosecuting attorney's office, *except for those portions relating particularly to property not listed in the second search warrant about which Walton volunteered information,* were inadmissible as 'fruit of the poisonous tree'."

Appellants argue that the statements made to the prosecuting attorney were inadmissible since appellants did not waive their constitutional rights under the holding of *Miranda* v. *Arizona,* 384 U.S. 448. This point also was decided adversely to appellants' contention in *Walton and Fuller* v. *State, supra,* when we said:

> "Although objection was made to the statements made in the prosecuting attorney's office as being inadmissible under the rule announced in *Miranda* v. *State of Arizona,* 384 U.S. 448, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we find adequate evidence to support the trial judge's finding that the warnings required by that rule were given, and that the statements were voluntary and made under waiver of the rights enumerated in the above case. Neither Walton nor Fuller was in custody at that time on any charge. Before interrogation, both were advised of their rights as to the giving of statements. There is nothing to indicate that either was not intelligent enough to understand the statement of his rights. Nor does it appear that either was not conscious that he was waiving them in answering questions. Walton actually signed a written waiver, on which his constitutional privilege against self-incrimination and right to counsel are clearly and fully listed. There is no indica-

> tion that this was not a free and voluntary act on his part. While Fuller did not sign the waiver, there is testimony that an identical statement of his rights was read to and by him before any interrogation, after which he expressed his willingness to answer questions. It was only after the interrogation was virtually concluded that he was asked to sign a written waiver of these rights, and he then stated that he wanted a lawyer 'if it got down to where he had to sign something.' In addition to the warnings at the time of the interrogation of Walton and Fuller in the prosecuting attorney's office, the evidence that both were advised of these rights at the time of the search is convincing."

As to their third point for reversal, appellants raise the issue of double jeopardy and argue that the trial court erred in accepting the verdict of the jury sentencing the defendants to a longer term than they had received at the first trial of the case. Arkansas Statutes Annotated §41-3938 (Repl. 1964) is as follows:

> "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty-one (21) years; and if the aggregate value thereof be not more than thirty-five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one [1] year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

This issue of former jeopardy was discussed rather thoroughly in the very recent decision of this court

rendered on April 1, 1969, in the case of *Stout* v. *State*, 246 Ark. 479, ___ S.W. 2d ___.

There was no "implied acquittal" of the appellants by the reversal of their first conviction in the case at bar and different degrees of the offense were not involved as was the situation in *Green* v. *United States*, 355 U.S. 184, cited in *Stout* v. *State, supra*. In the *Green* case the accused was first convicted of second degree murder and the court held that he could not be re-tried for first degree murder, having been impliedly acquitted of that *degree* of the crime. When an accused is tried on a specific degree of crime and is convicted of a lesser degree, which is included in the greater degree, he is thereby acquitted of the greater degree and cannot be tried again for the greater degree. This has been the law in Arkansas for nearly one hundred years. *Johnson* v. *State*, 29 Ark. 31. We now hold, as we have heretofore indicated, that the same rule applies where the difference in the *nature* of the punishment is the difference between life imprisonment and death. *Sneed* v. *State*, 159 Ark. 65, 255 S.W. 895. In the *Sneed* case the accused was first sentenced to life imprisonment and upon a new trial following reversal he was again sentenced to life imprisonment. Sneed was tried both times for the same degree of homicide, first degree murder, and this court approved an instruction at the second trial advising the jury that if Sneed was again found guilty of first degree murder, he could only be sentenced to life imprisonment and could not be sentenced to death. We perceive that this rule was based, not on the degree of the crime or the degree of punishment, but upon the difference in the *nature* of the punishment provided by statute for first degree murder, life imprisonment or death by electrocution.

In the case at bar the appellants were tried and convicted twice for the possession of stolen goods which exceeded the aggregate value of $35.00. Some of the items of stolen goods offered in evidence at the first trial were inadmissible and appellants were granted a new trial at their own request. At the second trial, before a new and different jury, only the admissible portion of the stolen goods was offered in evidence and this jury was not at lenient in fixing punishment as the trial court was in the first trial. The punishment fixed by the jury at the second trial was of the same nature as that fixed by the judge in the first trial and was well within the maximum fixed by statute. Had the appellants served time under the first sentence, they would have been entitled to credit on the second sentence for time served on the first, *Stout* v. *State, supra.*

The appellants rely on the case of *Patton* v. *State of North Carolina,* 381 F. 2d 636. The defendant in that case had served five years of a twenty year sentence imposed by the trial judge on a plea of nolo contendere. The conviction was overturned on constitutional grounds under state post-conviction procedure, and at the second trial the defendant was sentenced by the trial judge to twenty-five years with credit allowed for the five years served and leaving twenty years yet to be served. The Fourth Circuit Court of Appeals held that the defendant had not waived the benefits of his initial sentence, "because of the restrictive effect this has on access to post-conviction remedies." The case at bar reaches us by direct appeal and not through post-conviction relief procedure, so we fail to see where the 14th Amendment to the constitution is involved in this case at all.

Juries in this state are closely examined on voir dire before they are accepted for service in a given case.

While no one would deny that the jury system does not insure perfect justice in every case, no better system for doing so has yet been devised.

We think, the better rule to be, that where a defendant appeals from a conviction and is successful in obtaining a new trial, he must accept the hazards as well as the benefits of a new trial and assume the risk of a more severe sentence of the same nature at the hands of a new and different jury, when the second verdict is within the same degree and the punishment is within the statutory maximum fixed for the degree.

The appellants were not "put in jeopardy of life or limb" at all in this case under any reasonable interpretation of Amendment 5 of the constitution, nor have the appellants been deprived of "life, liberty, or property, without due process of law" under any reasonable interpretation of Amendment 14. We prefer to weigh appellants' rights by the plain and simple language of the constitution rather than attempting to measure the constitution by what we perceive appellants' rights should be. We are unwilling to say to the appellants "you are entitled to a new trial because some of the evidence at your first trial was inadmissible. If your second trial results in less punishment or acquittal, that is well and good, and your constitutional rights to a speedy and public trial by an impartial jury under Amendment 6 to the constitution have been met and fully complied with. But if your second trial results in a greater penalty than the first even though the punishment is of the same nature and well within the statutory limitation for the offense charged, that part of your new trial violates your constitutional rights and will not be permitted to stand."

We are unable to derive such procedure from the constitution and we are unwilling to read such procedure into the constitution. We hold that under the law of Arkansas a new trial granted in a criminal case for error committed in the first trial constitutes a new trial as to penalty imposed by the verdict, as well as to guilt or innocence where the verdict in the second trial is for the same degree of crime as the first verdict, and the penalty assessed by the second verdict is of the same nature and within the statutory limitations for the degree of the crime involved.

The judgment of the trial court is affirmed.

APPENDIX "B"

SUPREME COURT OF ARKANSAS

No. 5353

Opinion Delivered Sept. 9, 1968

MILFORD FULLER AND LEO WALTON, *Appellants*

v.

STATE OF ARKANSAS, *Appellee*

Appeal from Boone County Circuit Court;
HON. JOE D. VILLINES, Judge
REVERSED AND REMANDED
JOHN A. FOGLEMAN, Justice

The basic question raised by appellants is that of validity of a search and seizure. It was properly raised in the trial court by motions to suppress evidence and objections to testimony and evidence, all of which were denied and overruled. Although it appears that several charges were filed against appellants Walton and Fuller as a result of the investigation of which this search was a part, this appeal is taken from a judgment of conviction of appellants of the crime of possessing a Zenith color type television and a Zenith stereo type record player, alleged to have been stolen from one Chuck J. Carter, proprietor of Carter-Binley Appliance Company of Seymour, Missouri.

The investigation was commenced by Sheriff Mickey Owen of Greene County, Missouri, who came to Harrison

in pursuit of a large quantity of men's clothing and television sets said to have been stolen from business establishments in his county. After he arrived in Harrison on the morning of September 7, 1967, he was accompanied to the office of the municipal judge by the prosecuting attorney of the 14th judicial district, the sheriff of Boone County, Sgt. Earl Rife of the Criminal Investigation Division of the Arkansas State Police, and the president of a clothing store in Springfield, Missouri, from which it was charged that a large quantity of merchandise had been stolen. A hearing was held to determine probable cause for the issuance of a search warrant. A draft of an affidavit for a search warrant, which Sheriff Owen was prepared to execute, was presented to the judge and was in the following form (omitting formal parts):

> "Information has been presented to me, under oath, by George L. Hall, President of Williams Clothing Store, Springfield, Mo., that said store was burglarized on 9-4-67 and 400 mens suits, three top coats, ten sport coats, five pants, eight threepiece combination sport suits of the approximate cost to us of $20,000.00; and further information has been presented to me by a confidential informant whose information has proved reliable before, and whom I believe to be reliable, and I believe this information given by said informant now is reliable and that I do in truth suspect that such property is concealed in the frame dwelling house, barns, tool sheds and other out buildings located on a forty acre tract of land owned by Ed Willis and Golden Rich Distributing Co., Inc., on the Cottonwood Road, Boone County, described as the SW NW 4-19-20, as recorded on deed appearing at book 96, page 446, said lands being used by Ed Willis and others at 5 miles North on Cottonwood Road in the State and County aforesaid, and pray a warrant from said Court to search said premises, dwelling house, barns, garages, out-

buildings and automobiles situated on said lands and to seize any and all of the above property found thereon."

Inquiry was conducted to determine probable cause for the issuance of the warrant, but the judge did not administer any oath to any witness. The hearing consisted of a reading of the affidavit by the judge, a statement by the president of the concern that a list attached to the affidavit was a description of the merchandise lost by it and affirmative responses of Sheriff Owen to inquiries by the judge whether he had on previous occasions relied on the unnamed informer and whether success had been realized as a result of this reliance. The judge also asked why the officers thought the property sought would be at the place to be searched by the time they got there and was told that the place was "staked out." Sheriff Owen then signed the affidavit, an oath was administered to him and the following warrant was issued (omitting formal parts):

"Information has been presented to this Court by Mickey Owen, Sheriff, Greene County, Mo. that the Williams Clothing Store, Springfield, Mo. was on the 9-4-67 burglarized and robbed of approximately 400 men suits, 3 top coats, 10 sport shirts, 5 pants, 8 3-piece suits as further described on the attached list of stolen goods; and that he has reasonable cause to believe that said stolen goods along with recently stolen TV sets as per the attached list are stored in a dwelling house and outbuildings located on the SW NW 4-19-20 in Boone County, said property being owned by Ed Willis and Golden Rich Distributing Co. Inc., a corporation. That he has reason to believe that said property is being wrongfully and unlawfully concealed by the said Ed Willis and Golden Rich Distributing Co., Inc., some place on the premises of the above described property in Boone County,

Arkansas said premises being now occupied by the said Ed Willis and Golden Rich Distributing Co., Inc., a corporation and he requests that a Search Warrant be issued authorizing and directing that a search be made of said premises for said property. And it appearing to the Judge of the Boone County Municipal Court that there are reasonable grounds to believe that said property is being wrongfully and unlawfully concealed as aforesaid, you are hereby directed to search the premises afore-described in the day time for such property, and if the same be found that you take said property into custody and hold the same in your custody for further orders of this Court; and that you make due return of this writ to this Court."

About three hours later the officers returned to obtain a warrant for a search of other premises. Upon inquiry by the municipal judge, without administration of any oath, they reported that their initial search resulted in the discovery of some of the merchandise sought and Sheriff Owen stated that the informant mentioned in the affidavit he then proposed to sign was the same as the one from whom he obtained the information upon which the first search was based. Thereupon the affidavit was signed by Sheriff Owen and the search warrant issued. This affidavit was as follows:

"I, Mickey Owen, Sheriff of Greene County, Missouri, do solemnly swear that: on September 1, 1967, the Carter Hillen Appliance Co., Springfield, Missouri, was burglarized and 22 TV sets were stolen, as per the attached list setting forth the set and each serial number and description; that information has been presented to me by a confidential informant, which information I believe to be reliable; and that the information given to me in the past by said informant has been reliable, the information being that said TV sets were brought to Boone County, Arkansas, and that I do in truth

suspect that such property is concealed in the business place of the Golden Rich Distributing Co. Inc., a corporation, on the Clarence Hudson property located on Highway 65N in Harrison, Arkansas occupied by Golden Rich Distributing Co., Inc. in the State and County aforesaid, and pray a warrant from said Court to search said property, including the business place, warehouse, storagerooms, garages, outhouses, automobiles, trucks and any other place of concealment located on said property, and to seize any of the said TV sets located therein."

The search warrant read (omitting formal parts):

"Information has been presented to this Court by Mickey Owen, Shreiff of Greene County, Mo. that on 9-1-67 the Carter Hillen Appliance Co., of Springfield, Mo. was burglarized and that 22 TV sets of the description and value as set forth on the attached list were stolen; That he has reasonable grounds to believe, and upon probable cause does believe that said property was brought to Boone County and is now located on the Clarence Hudson property on Highway 65N in Harrison, Arkansas, in the buildings and other places of concealment located on said property occupied by Golden Rich Distributing Co., Inc. a corporation; That he has reason to believe that said property is being wrongfully and unlawfully concealed by one Golden Rich Distributing Co., Inc. and its officers and agents some place on the premises of the above described lands and the buildings and trucks thereon in Harrison, Boone County, Arkansas said premises being now occupied by the said Golden Rich Distributing Co., Inc., a corporation, and its officers and he requests that a Search Warrant be issued authorizing and directing that a search be made of said premises for said property. And it appearing to the Judge of the Boone County Municipal Court that there are reasonable grounds

> to believe that said property is being wrongfully and unlawfully concealed as aforesaid, you are hereby directed to search the premises aforedescribed in the day time for such property, and if the same be found that you take said property into custody and hold the same in your custody for further orders of this Court; and that you make due return of this writ to this Court."

The rule requiring exclusion of evidence obtained as a result of a search and seizure violating the Fourth Amendment to the Constitution of the United States has been held applicable (via the Fourteenth Amendment) to the states by the Supreme Court of the United States in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). That court has also held that the standards of "reasonableness" for obtaining a search warrant are the same under both the Fourth and Fourteenth Amendments, saying that the latter imposes all the prescriptions of the former as to searches and seizures on the statute. *Ker* v. *California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). In determining probable cause for the issuance of a search warrant, the magistrate must judge for himself the persuasiveness of the facts relied upon by a complaining officer and may not accept a complainant's conclusions without question. *Giordenello* v. *United States*, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958); *Aguilar* v. *Texas, supra*. While an affidavit for a search warrant may be based upon personal observations of the affiant, it may also be based, in whole or in part, on hearsay information. When it is based upon hearsay, the magistrate must be informed of some of the underlying circumstances from which an informant concluded that the object of a proposed search was where he said it was. He must also be advised of some of the circumstances from which the officer concluded that the

informer (whose identity need not be then disclosed) was credible or his information reliable. An affidavit, which does not contain any affirmative allegation that affiant speaks with personal knowledge of the matters contained therein and also fails to show that information given by an unidentified source was not merely his suspicion, belief or conclusion, has been held not to show probable cause. *Aguilar* v. *Texas, supra.*

The use of oral testimony to support an affidavit for the issuance of a search warrant satisfies Fourth Amendment standards of reasonableness. *Miller* v. *Sigler,* 353 F. 2d 424 (8th Cir. 1965); *Gillespie* v. *United States,* 368 F. 2d 1 (8th Cir. 1966). Under the Fourth Amendment, however, a magistrate may not properly issue a search warrant unless he can find probable cause from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not sufficient. *Nathanson* v. *United States,* 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed 159 (1933); *Aguilar* v. *Texas, supra.* Even if the additional information given the municipal judge in this case had been under oath and included in the affidavits, it did not supply any of the underlying circumstances supporting the statements which were contained in the affidavits. We are unable to find statements of underlying facts and circumstances meeting the tests required by the cited decisions of the United States Supreme Court which justified issuance of either search warrant.

The success of the search will not validate it since it was unlawful at its inception. *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

In view of this finding, it is unnecessary for us to consider other attacks made upon the search warrants.

Since neither the television set nor the record player described in the charge in this case was the subject of either search, however, it remains for us to determine the effect of the invalidity of these searches upon this case. In doing so, we must apply the doctrine of the "Fruit of the Poisonous Tree." Under this doctrine, both the indirect and direct products of an unlawful search must be excluded from evidence. *Wong Sun* v. *United States, supra.* Even this doctrine does not require that all evidence be excluded as "fruit of the poisonous tree" simply because it would not have come to light but for illegal actions of officers. The question is whether the evidence to which objection is made was obtained by exploitation of the illegal action or by means sufficiently distinguishable to be purged of the taint of illegality. *Wong Sun* v. *United States, supra.* The burden is on the accused to convince the court that evidence is inadmissible under this doctrine. *Nardone* v. *United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

It is undisputed that the particular property on which the present charge is based was not described in either search warrant. When the officers arrived at the named premises for the second search, the warrant was read and then given to Walton. None of the officers asked either of the appellants any questions. In spite of this, Walton, in the presence of Fuller, voluntarily advised Sheriff Hickman of Boone County and Sgt. Rife that there was a quantity of other property besides the television sets for which the search was being conducted, and that he wanted to show them where it was. He told them that he had certain suits of clothing and the television set and record player upstairs in his living quarters. He said he had bought the television set and record player from Fuller and had gotten the television from among those

downstairs. When the officers inspected (at the invitation of Walton) the serial number on the television set did not match any number on the list they had. After a discussion between the officers and Walton, it was agreed that the officers would not take these items, but could come back at a later date and look them over. Later, on September 12th, Sgt. Rife and Carter, the alleged owner of the property, went to the premises, after a telephone call by Sheriff Hickman to Walton, and were admitted by the latter for the purpose of checking serial numbers. The serial number on the television set corresponded with a number on a list of property Carter alleged had been stolen from him. When they were unable to check the serial number on the record player because they had no screwdriver with which to remove the back of the instrument, Walton told them that it came in at the same time the television set did and to go ahead and take it because he knew that it belonged in "that stuff." Under these circumstances, the property found in the Walton living quarters and his statements about them were not come about through exploitation of an illegal search. Walton also showed the officers other property which was not described in the search warrant then being executed. We find that there was a definite waiver of the requirement of a search warrant for any of this property.

For the reasons above set out, the television set and record player were admissible in evidence. However, neither the items discovered as a result of the two searches (except for those items not the object of the search, about which Walton voluntarily informed the officers) nor testimony relating thereto was admissible in evidence. Thus, identification of property which was inadmissible should have been excluded by the trial court as "fruit of

the poisonous tree," even though it was offered only for the purpose of showing intent and a course of conduct. Furthermore, statements of both Walton and Fuller made in the prosecuting attorney's office, except for those portions relating particularly to property not listed in the second search warrant about which Walton volunteered information, were inadmissible as "fruit of the poisonous tree." The erroneous admission of such testimony and evidence certainly cannot be said to have been harmless.

Although objection was made to the statements made in the prosecuting attorney's office as being inadmissible under the rule announced in *Miranda* v. *Arizona*, 384 U.S. 448, 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966), we find adequate evidence to support the trial judge's finding that the warnings required by that rule were given, and that the statements were voluntarly and made under waiver of the rights enumerated in the above case. Neither Walton nor Fuller was in custody at that time on any charge. Before interrogation, both were advised of their rights as to the giving of statements. There is nothing to indicate that either was not intelligent enough to understand the statement of his rights. Nor does it appear that either was not conscious that he was waiving them in answering questions. Walton actually signed a written waiver, on which his constitutional privilege against self incrimination and right to counsel are clearly and fully listed. There is no indication that this was not a free and voluntary act on his part. While Fuller did not sign the waiver, there is testimony that an identical statement of his rights was read to and by him before any interrogation, after which he expressed his willingness to answer questions. It was only after the interrogation was virtually concluded that he was asked to sign a written waiver of these rights, and he then stated

that he wanted a lawyer "if it got down to where he had to sign something." In addition to the warnings at the time of the interrogation of Walton and Fuller in the prosecuting attorney's office, the evidence that both were advised of these rights at the time of the search is convincing.

While the State contends that Fuller has no standing to contest the validity of the second search, we feel that this argument is without merit under the circumstances of this case. It would be anomalous to say that one charged with possession of stolen property because of its presence on certain premises could not contest a search of these premises without showing his interest therein or his right to possession, occupancy or use thereof. See *Jones* v. *United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

In view of the disposition we make of this case, other questions raised by the appellants need not be determined.

The judgment is reversed and the cause remanded for a new trial.

APPENDIX "C"

STATE OF ARKANSAS,

In the Supreme Court SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A. D. 1968, amongst others were the following proceedings, to-wit:

On the 19th day of May, A.D. 1969, a day of said term

Milford Fuller & Leo Walton Appellant

No. 5410 vs.

The State Of Arkansas Appellee

Appeal from Boone, Circuit Court
Petition on rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 3rd day of June, A.D. 1969.

Jimmy H. Hawkins
Clerk

By Carl H. Baker
D. C.

(SEAL)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS
BRIEF OF RESPONDENT IN OPPOSITION

JOE PURCELL
Attorney General
State of Arkansas
DON LANGSTON
Deputy Attorney General
Justice Building
Little Rock, Arkansas 72201
Counsel for Respondent

PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Both opinions of the Supreme Court of Arkansas concerning petitioner's case have been properly noted in the petition for writ of ceretiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority on which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

On November 9, 1967, appellant along with Leo Walton was accused of the crime of possession of stolen goods in that they were in possession of a color television and stereo record player. Both were found guilty of the crime and the jury being unable to set the punishment, the court sentenced each appellant to four years in the Arkansas State Penitentiary.

They appealed the case to the Supreme Court of Arkansas which reversed and remanded the case for a new trial. *Fuller & Walton* v. *State of Arkansas,* 245 Ark. 91, 431 S.W. 2d 462. A new trial resulted in a conviction with petitioner and his co-defendant receiving a 10 year sentence which punishment was fixed by the jury. They again appealed the case and it was affirmed in *Fuller & Walton* v. *State of Arkansas,* 246 Ark. 681, 439 S.W. 2d 801. Petitioner Fuller alone petitions this court for certiorari and presents three questions to the Court.

ARGUMENT

It is submitted that the Petition for Writ of Certiorari does not disclose any substantial issue of law which warrants review by this Court. The record in this case fails to support the conclusion that petitioner was deprived of any right under the Constitution of the United States. Respondent is benefited by the studied and lengthy opinion of the Supreme Court of Arkansas affirming petitioner's conviction. This decision is correct and in accordance with the several pronouncements of this Court.

I

Whether error was committed in holding that a television set and record player were admissible into evidence regardless of the fact that their disclosure was during a search being conducted under the authority of an invalid search warrant.

Petitioner in presenting this question to the court relies on the case of *Bumper* v. *North Carolina*, 391 U.S. 543. That case can readily be distinguished from the case at bar. In *Bumper*, the consent to search relied upon was to search for the very articles and the very place named in the invalid search warrant. In the present case, the articles seized and the place that was searched were not named in the invalid search warrant. Hence, that case is no authority for excluding from evidence the stereo record player and the color television set.

In two well reasoned opinions concerning petitioner in our State Supreme Court, our Court held that these articles seized could be properly introduced in evidence. We invite this Court to carefully read those decisions and we think that the language contained therein should be per-

suasive on this Court in deciding this case. The pertinent language is as follows:

> "Appellants' first and fourth points have already been decided adversely to their contention in *Walton and Fuller* v. *State, supra,* and our decision there becomes the law of this case as to the admissibility of evidence as to the television set and the record player which defendant "voluntarily" pointed out to the officers at the time of the second search. In that case we held this evidence to be admissible regardless of the fact that the voluntary disclosure was made at a time when the search was being conducted under the authority of the defective warrant. On this point we said:
>
> > " . . . Walton, in the presence of Fuller, voluntarily advised Sheriff Hickman of Boone County and Sgt. Rife that there was a quantity of other property besides the television sets for which the search was being conducted, and that he wanted to show them where it was. He told them that he had certain suits of clothing and the television set and record player upstairs in his living quarters. . . . *Under these circumstances, the property found in the Walton living quarters and his statements about them were not come about through exploitation of an illegal search . . .*
> >
> > *For the reasons above set out, the television set and record player were admissible in evidence."* (Emphasis supplied.)

II

Whether error was committed in holding that statements given officers were admissible into evidence, even though the product of a search and seizure under an invalid search warrant.

In presenting this question to the Court, petitioner relies on the case of *Fahy* v. *Connecticut*, 375 U.S. 85. The *Fahy* case can readily be distinguished from the case at bar. The confession was obtained by the police as direct and proximate result of the illegal search and seizure under an invalid search warrant. In the present case the confession was not a direct and proximate result of an illegal search and seizure under an invalid search warrant. The statements were obtained as a result of a search and seizure of articles not named in the invalid warrant and from a place not named in the invalid warrant. The search and seizure being legal, it necessarily follows that the statements were not tainted and are admissible in evidence.

In the first case concerning petitioner, our Supreme Court held that the statements of petitioner and his co-defendant were voluntary and admissible in evidence. Even so, they still contended in their second appeal that they did not waive their constitutional rights under the holding of *Miranda* v. *Arizona*, 384 U.S. 448.

In order to test the voluntariness of the statements, they filed a motion to suppress the statements and the trial court held a *Denno* hearing in accordance with the holding of *Jackson* v. *Denno*, 378 U.S. 368. After hearing the evidence the trial court found that the statements were voluntarily made and permitted them to be introduced in evidence.

We think the trial court was correct in permitting the statements to be admitted into evidence and submit that the language contained in the opinion of the Supreme Court of Arkansas on this point should be persuasive with this Court. There, they said:

"Although objection was made to the statements made in the prosecuting attorney's office as being inadmissible under the rule announced in *Miranda* v. *State of Arizona*, 384 U.S. 448, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we find adequate evidence to support the trial judge's finding that the warnings required by that rule were given, and that the statements were voluntary and made under waiver of the rights enumerated in the above case. Neither Walton nor Fuller was in custody at that time on any charge. Before interrogation, both were advised of their rights as to the giving of statements. There is nothing to indicate that either was not intelligent enough to understand the statement of his rights. Nor does it appear that either was not conscious that he was waiving them in answering questions. Walton actually signed a written waiver, on which his constitutional privilege against self-incrimination and right to counsel are clearly and fully listed. There is no indication that this was not a free and voluntary act on his part. While Fuller did not sign the waiver, there is testimony that an identical statement of his rights were read to and by him before any interrogation, after which he expressed his willingness to answer questions. It was only after the interrogation was virtually concluded that he was asked to sign a written waiver of these rights, and he then stated that he wanted a lawyer 'if it got down to where he had to sign something.' In addition to the warnings at the time of the interrogation of Walton and Fuller in the prosecuting attorney's office, the evidence that both were advised of these rights at the time of the search is convincing."

III

Whether error was committed in sentencing petitioner to a longer term, ten years, upon a retrial of his case after a reversal of a sentence of four years for errors under the Constitution of the United States.

In the first trial the jury, after finding petitioner guilty, was unable to agree on the amount of punishment to be given. The trial judge then fixed his punishment at four years in the State Penitentiary. After reversal, and on retrial a jury again found petitioner guilty and fixed his punishment at 10 years in the State Penitentiary.

Prior to our Supreme Court decision in the present case our Federal courts had wrestled with the problem presented in this case many times. There appear to be three rules which grew out of those cases. They were as follows:

1. Allow more severe sentencing without limitation *U. S.* v. *Russell*, 378 F. 2d 808.

2. Impose an absolute prohibition on increased sentences. *Patton* v. *North Carolina*, 381 F. 2d 636.

3. Prohibit increased sentences unless evidence occurred and came to the court's attention, subsequent to the first sentence which evidence warrants an increased penalty. *Marano* v. *U.S.*, 374 F. 2d 583.

The question appears to have been layed to rest in the case of *North Carolina* v. *Pearce*, 395 U.S. 711. In that case this Court held that there was no constitutional bar to a criminal defendant receiving a greater sentence on retrial. However, this Court did strike down the sentences in that case because credit was not allowed for previous service in the Penitentiary for the same offense and it appeared that the greater sentence was imposed

by the trial judge because the criminal defendant had exercised his constitutional rights of appeal. Those problems are not present in the case at bar.

Here, petitioner is on bond and has not served any time in the Penitentiary under his first conviction. Be that as it may, a defendant is allowed time for service in the Penitentiary. See *Kimble* v. *State of Arkansas*, 246 Ark. 407, 438 S.W. 2d 705.

Further, in this case, we do not have the problem of punishing a criminal defendant with a greater sentence on retrial if he is successful in getting a reversal of his first conviction. In Arkansas, under *Ark. Stat. Ann.* § 43-2145, the jury fixes the punishment at the same time a verdict of guilt is returned. If the jury is unable to agree on the punishment, *Ark. Stat. Ann.* § 43-2306 permits the trial court to fix the punishment. In the case at bar, the jury was more severe in fixing the punishment on retrial than the trial court was in fixing the punishment on the original conviction. It must be presumed that the jury knew nothing about and was not punishing petitioner for exercising his right of appeal of his first conviction. Perhaps, if the court had set the punishment at greater than four years on the second conviction a *Pearce* situation might have arisen. But such is not the case. The jury on the second trial fixed petitioner's punishment well within the statutory limits for the crime of possession of stolen property. See *Ark. Stat. Ann.* § 41-3938.

We submit that the reasoning set forth in the second opinion in this case by our State Supreme Court is sound and excellent. We think that this Court should adopt that reasoning and hold that petitioner's rights were not violated in this case because of the greater sentence on retrial. Since the language of our Supreme Court is set out in Appendix A to petitioner's petition, we will not quote it here.

CONCLUSION

Petitioner's assignment of error and his arguments in favor of granting a writ of certiorari are entirely without merit. Certiorari should be denied.

Respectfully submitted,

JOE PURCELL
Attorney General
State of Arkansas

DON LANGSTON
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201
Counsel for Respondent

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF

EUGENE W. MOORE
ROBERT G. BROCKMANN
A. A. C. Building
Harrison, Arkansas 72601
DALE PRICE
FLETCHER JACKSON

211 Spring
Little Rock, Arkansas 72201

Counsel for Petitioner

PARAGON PRINTING CO., LITTLE ROCK

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IN THE

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No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

REPLY TO BRIEF IN OPPOSITION AND SUPPLEMENTAL BRIEF

STATEMENT

Petitioner, Milford Fuller, deems it necessary to reply to the Brief of Respondent, State of Arkansas, in opposition, and also finds it necessary that his original petition be supplemented because of the recent decision of *North Carolina* v. *Pearce*, 395 U.S. 711 89 S. Ct. 2072 (1969).

ARGUMENT

As to questions presented I and II below, Petitioner will reply in sequence to the statements and arguments made by Respondent on those points. As to question presented No. III, Petitioner wishes to supplement his original arguments by citation and discussion of *North Carolina* v. *Pearce, supra.*

I

The Respondent seeks to distinguish the present case from the case of *Bumper* v. *North Carolina,* 391 U.S. 543, by saying "that case can be readily distinguished from the case at bar. In *Bumper,* the consent to search relied upon was to search for the very articles and the very place named in the invalid search warrant. In the present case the articles seized and the place that was searched were not named in the invalid search warrant."

Where Respondent gets this view we are unable to state, for the warrant in the *Bumper* case was never produced for the record, 391 U.S. 543, 550, Note 15. Respondent's contention does not coincide with the facts in the present case either.

The invalid search warrant appears both in the record and in detail in the opinion of the Arkansas Supreme Court in *Walton* v. *State,* 245 Ark. 91, 431 S.W. 2d, 462 (1968) (Appendix "B" of Petition). It contains all inclusive language concerning the locations to be searched, and speaks of "the premises now being occupied by said Golden Rich Distributing Co., Inc., a corporation and its officers . . . " All the television sets, including the television set and the stereo here involved, were found in interconnecting rooms in the same building, and hence

were found in the very place named in the invalid search warrant. Respondent's distinctions do not exist in fact, and even if they did, would not constitute reasonable or adequate grounds to reach a different result than that reached in *Bumper*.

Petitioner is unable to answer the questions as to why the Arkansas Supreme Court ignored the plainly applicable rule enunciated in *Bumper*, which was repeatedly urged upon it by him, and why that Court instead used the "bootstrap" method to sustain the conviction, holding that the dicta in its first opinion was the law of the case for the second opinion.

The Arkansas Supreme Court reversed Petitioner's first conviction in *Walton* v. *State*, 245, Ark. 91, 243 S.W. 2d, 462 (1968), but in dicta stated that the television and the stereo in question here were not the product of an illegal search and seizure. The trial court, taking the Arkansas Supreme Court at its word, allowed in evidence the television and the stereo. The Arkansas Supreme Court on the second appeal in *Fuller* v. *State*, 246 Ark. 681, 439 S.W. 2d 801 (1969) affirmed the case upon the authority of its dicta from the previous case, in spite of the decision in *Bumper*.

The Respondent, State of Arkansas, would place the burden upon a criminal defendant to appeal every lower court decision if it contained any unfavorable dicta. This would place an unnecessary load on the docket of the Supreme Court of the United States and financial burden upon criminal defendants; and efficient justice would not be served in the process.

The United States Supreme Court's supremacy in the decision of Federal Constitutional questions such as pre-

sented here is too well settled to permit argument at this time; and the Arkansas Supreme Court must yield and conform despite its previous decisions or dicta, and can not find shelter behind such phrases as "our decision there becomes the law of this case". U. S. Constitution Article 6, Clause 2.

II

Respondent, State of Arkansas, seeks to distinguish the case of *Fahy* v. *Connecticut*, 375 U. S. 85, by stating "in the present case the confession was not a direct and proximate result of an illegal search and seizure under an invalid search warrant". Again, the facts do not support the Respondent.

The day following the search, Petitioner was questioned in detail concerning all the items seized with the invalid search warrant; and statements were thereby obtained from him (R.226). The causation in this case is classic: confrontation into confession, "Please explain your possession of these stolen goods." The essential facts of the present case are so similar to those in *Fahy* as to make inescapable the conclusion that the entire statement should have been suppressed under the doctrine enunciated in that case.

Respondent has asserted that the requirements of *Miranda* v. *Arizona*, 384 U.S. 448 were met with regard to the Petitioner. Suffice it to say that the totality of circumstances (Petitioner being confronted with illegally seized evidence, being confronted with an array of officers in a small room, failing to clearly indicate a knowledgable waiver of his rights at the outset of questioning, later refusing to sign a written waiver and indicating a desire

for counsel) all negate a meeting of the "heavy burden" requirement of the *Miranda* case.

III

Since the filing of Petitioner's Petition for a Writ of Certiorari, the case of *North Carolina* v. *Pearce*, 395 U.S. 711, has been decided. Under that decision, Petitioner's sentence of ten years, after the reversal of his first conviction and sentence of four years, is not ipso facto invalid. We read that opinion, however, as a mandate that an increased sentence be justified on the record. We quote from *North Carolina* v. *Pearce, supra,* as follows: "In order to assure the absence of such a motivation [vindictiveness], we have concluded that whenever a Judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear * * * And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal * * * Nonetheless, the fact remains that neither at the time the increased sentence was imposed upon Pearce, nor at any stage at this Habeas Corpus procedure, has the State offered any reason or justification for that sentence beyond the naked power to impose it".

Likewise, Respondent, State of Arkansas, has not in its brief in opposition, nor at any other time, offered one single reason or justification for the additional six years imposed upon Petitioner at his second trial.

Respondent, State of Arkansas, instead of trying to justify Petitioner's increased sentence, endeavors to argue that *North Carolina* v. *Pearce, supra* is distinguishable

because that opinion deals only with Judge-imposed sentences. Under Respondent's view of the *Pearce* ruling, States such as Arkansas, which permit the jury to assess the penalty at the same time it determines guilt, would, to a large extent, escape the force of the *Pearce* ruling. Thus, in rural areas across the nation, juries (which in such areas may be as knowledgable as Judges about what previously happened in a certain case) might be permitted to accomplish what the *Pearce* case prohibits.

Also we would note that the Arkansas procedure on the juries' determining guilt and punishment in a single verdict is presently before the United States Supreme Court on certiorari at the present time. See *Maxwell v. Bishop*, No. 622, 393 U.S. 997, 89 S. Ct. 488 (1969).

Because there are States such as Arkansas with the single-verdict procedure, the Supreme Court should grant certiorari in the present case so that the *Pearce* holding can be interpreted and explained in its effect on those states with the single-verdict procedure.

CONCLUSION

Premises considered, the arguments of respondent, State of Arkansas, in opposition to the granting of a Writ of Certiorari, are without merit; for the foregoing reasons and the reasons set forth in the original petition; petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

EUGENE W. MOORE
ROBERT G. BROCKMANN
A. A. C. Building
Harrison, Arkansas 72601
DALE PRICE
FLETCHER JACKSON

211 Spring
Little Rock, Arkansas 72201

Counsel for Petitioner